Issues: Two Group III Written Notices with Suspension and Termination (sleeping on the job); Hearing Date: 10/09/09; Decision Issued: 10/30/09; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 9182, 9183; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case Nos. 9182 and 9183

Hearing Officer Appointment: August 31, 2009
Hearing Date: October 9, 2009
Decision Issued: October 30, 2009

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge a Group III Written Notice, issued on March 27, 2009 by Management of the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A of April 23, 2009.

The Grievant also requested a hearing to challenge a Group III Written Notice and termination, issued on May 7, 2009 by Management of the Department, as described in the Grievance Form A of June 5, 2009.

The Director of the Department of Employment Dispute Resolution ("EDR") issued a Consolidation Ruling dated August 20, 2009, consolidating both of the Grievant's April 23, 2009 and June 5, 2009 grievances. Accordingly, both of the above grievances were heard in this proceeding and are the subjects of this decision. EDR Ruling Numbers 2010-2393 and 2010-2394 are incorporated herein by this reference.

The hearing officer was appointed on August 31, 2009. The hearing officer scheduled a second pre-hearing telephone conference call at 2:00 p.m. on September 11, 2009. The Grievant, the Agency's Advocate (the "Advocate") and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that he is challenging the issuance of the above referenced Group III Written Notices for the reasons provided in his Grievance Form As and is seeking the relief requested in his Grievance Form As, including removal of the disciplinary action and reinstatement. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on September 11, 2009 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Agency was represented by its advocate and the Grievant represented himself. Both parties were given the opportunity to make opening and closing statements, to call

witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency exhibits 1-6 in the Agency's binder and Grievant's exhibit 1.[1]

In this proceeding, the hearing officer also issued at the request of the Grievant three (3) Orders for Witnesses. No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was a correctional officer, previously employed by the Agency for approximately 11 years before the termination of his employment by the Agency.

2. On February 26, 2009, the Grievant was working as a Corrections Office ("C/O") at the security level 3 correctional institution (the "Facility") at which he was formerly employed. AE 4.

3. The Grievant was required pursuant to his Employee Work Profile ("EWP") to provide custody, security and supervision of adult offenders resulting in a safe and secure environment for staff, citizens of the Commonwealth and inmates. AE 4.

4. One of the core responsibilities assigned to the Grievant in his EWP included "supervision, control and observation of offenders and others. . ." AE 4.

5. During the morning of February 26, 2009, one of the Grievant's superior officers ("Sergeant M") observed the Grievant at his assigned security post in the second floor control room with his head down and his eyes closed.

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

6. The Grievant admitted that he closed his eyes while at this security post. Both Sergeant M (who has since left the Agency) and Sergeant B (who testified at the hearing) stated that the Grievant did not inform either of them that he was unable to remain alert at his security post and should be relieved. AE 1.

7. On February 27, 2009, Captain R observed the Grievant with his head slumped down and his eyes shut while at his assigned security post. The Grievant had not informed Captain R on February 27, 2009 that he was experiencing difficulty being alert or that he needed to be relieved.

8. The Grievant admits that he was staring at a trash can while assigned to his security post on February 27, 2009.

9. On both February 26, 2009 and February 27, 2009, the Grievant was not alert while on his security post at the times observed by his superior officers described above.

10. The Grievant has an active Group II Written Notice issued on June 9, 2008 for sleeping during working hours:

> On April 25, 2008, at approximately 4:30 p.m., you were observed in the first floor control room of C-4 by [Sgt. M] and you admitted to not being alert on post for an unspecified period of time and to taking medication that would make you drowsy but not informing your supervisor of your medication or its effect. This is a Group III offense, sleeping during work hours, which could result in immediate termination of employment. Future Group I, II or III offenses may result in termination of employment.

AE 5.

11. On April 25, 2009, C/O S went to exit through the C4 second floor gate but was unable to because the Grievant was asleep in the control room.

12. C/O S tried to wake the Grievant by various means such as by calling out to him and banging on the glass but was unsuccessful.

13. Ultimately, C/O S went to Sergeant B on the first floor and informed him of the situation.

14. Sergeant B went to the second floor control room, awakened the Grievant and relieved the Grievant from his security post.

15. The Grievant had not informed either of this two (2) supervisors, Lt. N or Sergeant B, that he could not remain alert.

16. The hearing officer does not find that the Grievant was "set up" by Management as the Grievant contends.

17. The testimony of the Agency witnesses was credible and consistent. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Pursuant to the SOC, each of the Grievant's infractions could clearly constitute a Group III offense, as asserted by the Department.

> THIRD GROUP OFFENSES (GROUP III).
>
> A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.
>
> B. *Group III* offenses include, but are not limited to:
>
> 7. violating safety rules where there is a threat of physical harm;
>
> 8. sleeping during working hours;

Department Operating Procedure Number 135.1. AE 6.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Warden and the Advocate that the Grievant's disciplinary infractions jeopardized the safety and security of staff, inmates and the general public. When he reported to work, the Grievant could be assigned to any post by his supervisors and he was required by written policy to be alert and attentive. The Grievant has admitted closing his eyes and the hearing officer has found that the Grievant was asleep while on duty. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense on each occasion.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his eleven years of service to the Department.

The normal sanction for one (1) Group III violation is termination but the Department, based on its assessment of mitigating factors, decided not to end the Grievant's employment for his infractions on February 26, 2009 and February 27, 2009 but only to issue the Group III Written Notice and to suspend him for two (2) work days. AE 1.

However, the Written Notice issued on March 27, 2009, plainly and clearly warned the Grievant as follows: "In addition to the two offenses stated above, you also have an active Group II for the same offense from June 2008, thus this occurrence is issued at a Group III. Future offenses at the Group I, II or III level before 03/26/2013, could result in termination of your employment." AE 1.

Similarly, the Department considered mitigation concerning the Written Notice issued on May 7, 2009. Accordingly, because the Department assessed mitigating factors and in fact mitigated the discipline concerning the Written Notice issued on March 27, 2009, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. the Grievant's service to the Agency over 11 years;

2. the Grievant's injuries, ailments and medication; and

3. the fact that a different supervisor under different facts and circumstances allowed a different C/O (who had informed his supervisor that he had influenza and wanted to stay home) to work in the tower at a different time. However, the hearing officer also recognizes that this coworker did not fall asleep or otherwise commit any disciplinary infraction.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

Here, the offenses in both Written Notices rose to Level III offenses. The Grievant was appropriately charged and found liable for two (2) Group III offenses with the second written notice specifying termination. As the Written Notice issued on May 7, 2009 provides, "You received a Group II for not being alert on Jun 08, 2008 and a Group III on March 27, 2009, for two not being alert incidents. You were warned about possible termination in the 3/27/09 Group III Written Notice. April 25th was the fourth time you have been found to be not alert on post." AE 3.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it

relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offenses were very serious and could separately stand as Group III offenses. Even were this not the case, any one on its own, if proven, would be extremely serious. Clearly, each of the mitigation decisions by the Department was within the permissible zone of reasonableness.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

DECISION

The Department has sustained its burden of proof in this proceeding and the action of the Department in issuing the Group III Written Notices and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Department's action concerning the Grievant is hereby upheld, having been shown by the Department, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).